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November 17, 2021

The Honorable Martin J. Walsh  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

Dear Secretary Walsh:

The Department of Labor's (DOL) Wage and Hour Division (WHD) implements and writes regulations for more than a dozen employment laws—including the *Fair Labor Standards Act* (FLSA) and the *Family and Medical Leave Act*—which collectively impact more than 10 million workplaces throughout the country. As businesses nationwide continue to recover from the COVID-19 pandemic, they are facing the prospect of new regulatory burdens and uncertainties from the WHD due to new legal interpretations and mandates. We are concerned that instead of working in a collaborative manner and providing businesses with needed compliance assistance, WHD is moving in the opposite direction.

Within two weeks of President Biden taking office, WHD ended the Payroll Audit Independent Determination (PAID) program.<sup>1</sup> PAID was a self-audit program that ensured businesses could rectify mistakes regarding FLSA minimum wage and overtime requirements. From its inception in 2018 to July 2020, the PAID program resulted in more than \$7 million in back wages paid to more than 11,000 workers. According to WHD, through the end of Fiscal Year 2019, PAID actions secured four times the back wages compared to traditional full enforcement investigations, and more than 10 times the back wages per DOL-staff hour invested.<sup>2</sup> The elimination of PAID is regrettable and signals a return to a heavy-handed enforcement-only approach by WHD, to the detriment of both workers and businesses.

We are also very concerned that WHD may again turn its back on compliance assistance by returning to the misguided Obama administration policy of not issuing opinion letters. Opinion letters help workers and businesses requesting fact-specific legal guidance to better understand and

<sup>1</sup> See News Release, U.S. Department of Labor Ends Program That Allowed Employers to Self-Report Federal Minimum Wage and Overtime Violations (Jan. 29, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210129>.

<sup>2</sup> See News Release, U.S. Department of Labor's PAID Program Helps Workers and Employers As America Reopens (July 14, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20200714>.

comply with complex wage and hour laws. Following a 70-year practice of issuing opinion letters, the Obama-run WHD stopped issuing this highly valued form of guidance, instead opting for top-down regulations using administrative interpretations (AI). The Trump administration appropriately returned to the practice of publishing opinion letters, issuing more than 70 during its tenure.

However, within less than a month of taking office, Biden's WHD withdrew five of these letters. To date, WHD has not published any new opinion letters.<sup>3</sup>

In addition, WHD withdrew the Trump administration's final rules on independent contractors and joint employment on May 6 and October 5, respectively.<sup>4</sup> In both rulemakings, businesses and workers provided valuable feedback that resulted in collaborative solutions, greater clarity, and enhanced entrepreneurial opportunities.

WHD's decisions to pull back on compliance assistance and to withdraw existing regulations are detrimental to job creators and workers, who will now be faced with uncertain and significant regulatory mandates from WHD.

Finally, we oppose President Biden's choice of David Weil to lead WHD. When Dr. Weil led WHD for nearly four years during the Obama administration, no opinion letters were issued. Instead, WHD created a hostile and adversarial environment for businesses using subregulatory guidance such as AIs. In 2015 and 2016, under Weil's leadership, WHD published two AIs resulting in drastic changes to the Department's treatment of independent contractors and joint employment. These changes threatened the future of independent contracting and jeopardized common business relationships.<sup>5</sup> Unlike the Trump administration regulations, neither of these AIs allowed for input from workers, employers, or other stakeholders.

Ensuring all workers are paid the wages they are owed involves a collaborative effort between WHD and employers. DOL should ensure workers and businesses have a say as WHD considers regulatory changes. This means following the notice-and-comment rulemaking process which requires a thorough analysis of proposed regulations and provides important safeguards to protect impacted stakeholders. We also request that WHD continue the 70-year practice of issuing opinion letters.

Thank you for your attention to these important issues.

Sincerely,



Virginia Foxx  
Ranking Member  
Committee on Education and Labor



Fred Keller  
Ranking Member  
Subcommittee on Workforce Protections

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<sup>3</sup> WHD, OPINION LETTER SEARCH, <https://www.dol.gov/agencies/whd/opinion-letters/search>.

<sup>4</sup> See News Release, U.S. Department of Labor To Withdraw Independent Contractor Rule (May 5, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210505>; News Release, U.S. Department of Labor Extends Effective Date Of Final Rule to Rescind March 2020 Joint Employer Rule (Sept. 20, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210920-0>.

<sup>5</sup> WHD, ADMINISTRATOR INTERPRETATIONS LETTER – FAIR LABOR STANDARDS ACT, <https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa>.